No. 5

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In the Supreme Court of the United States

OCTOBER TERM, 1970

UNITED STATES OF AMERICA,

Petitioner,

vs.

UNITED STATES COIN AND CURRENCY IN THE AMOUNT OF $9,674.00,

DONALD J. ANGELINI,

Claimant-Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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SUPPLEMENTAL BRIEF ON BEHALF OF CLAIMANT-RESPONDENT

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This supplemental brief is filed pursuant to the provisions of Rule 41(5) of the Supreme Court Rules, as amended, 1970.

The purpose of this supplemental brief is twofold: *First*: To distinguish *Helvering* v. *Mitchell*, 303 U.S. 391, a case

given but passing recognition by the government in its Brief but relied upon almost exclusively in oral argument had before this Court on February 25-26, 1969, and, therefore, not briefed by the respondent in the context orally argued by the petitioner; and, *Second*: To submit later authorities since those dates of initial argument and the present.

SUMMARY OF ARGUMENT

A. *Helvering* v. *Mitchell,* 303 U.S. 391, does not apply because the instant forfeiture is a pure penalty for invoking the privilege of self-incrimination. Penalty is not restricted to fine or imprisonment.

B. *United States* v. *One 1965 Buick*, 392 F. 2d 672 errs in its conclusion that the privilege against self-incrimination is a mere "exclusionary" rule of evidence. The interrelation between the payment and registration would compel self-incrimination in either case.

C. The instant case is particularly appropriate to retrospective application.

ARGUMENT

A.

HELVERING v. MITCHELL, 303 U.S. 391 DOES NOT APPLY BECAUSE THE INSTANT FORFEITURE IS A PURE PENALTY FOR INVOKING THE PRIVILEGE OF SELF-INCRIMINATION. PENALTY IS NOT RESTRICTED TO FINE OR IMPRISONMENT.

On the original argument, though mentioned only fleetingly in its Brief, the Government relied strongly upon *Helvering* v. *Mitchell,* 303 U.S. 391. The initial distinction there exists in that being (1) an argument resisting the imposition of the fifty percent penalty on taxes fraudulently evaded as placing a person twice in jeopardy, an issue not present here and (2) the conclusion of the Court that the fifty percent penalty to be assessed together with the tax owed was purely remedial, and proper to the effort expended in determining the tax fraudulently evaded. 303 U.S. at 401.

> "2. The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the taxpayer's fraud."

There can be no contention here similar to the *Helvering* rationale. This is not a tax, nor a compensating penalty,[1]

[1] The government has conceded in one case that delinquency penalties will not be assessed as to the taxes imposed under Title 26 U.S.C. 4401 and 4411 because the failure to pay the taxes was based on reasonable cause. *Mersel* v. *United States,* 5 Cir., 420 F.2d 517, 521.

specifically excluded from the operation of *Marchetti* and *Grosso*, 390 U.S. at 60.

The alleged gambling activities of Mr. Angelini for the period involved have separately been assessed, together with attendant penalties, and *paid*. This forfeiture is a pure penalty imposed as a result of illegal conduct, having no relation to compensation.

All of the cases on which the Government relies are totally inappropriate to the contentions here. It must be remembered that the only act which would make this property subject to forfeiture is the refusal of its owner to waive his Fifth Amendment rights. Carrying $8,764.00 is not an act warranting forfeiture. Using $8,674.00 in gambling enterprises is not an act warranting forfeiture. The only act the Government contends warrants this forfeiture is a failure to waive Fifth Amendment rights. The early case of *Boyd* v. *United States,* 116 U.S. 616 noted the difference.

> "But when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession; and in the case of excisable or dutiable articles, the Government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment; and in the case of goods seized on attachment or execution, the creditor is entitled to their seizure in satisfaction of his debt; and the examination of a defendant under oath to obtain a discovery of concealed property or credits is a proceeding merely civil to effect the ends of justice, and is no more than what the court of chancery would direct on a bill for discovery; whereas, by the proceeding now under consideration, the court attempts to extort from the party his private books and papers to make him liable for a penalty or to forfeit his property." *Boyd* v. *United States,* 116 U.S. 616, 624.

There is no question that if the claimant here had waived his Fifth Amendment rights and registered under Section 4412 this money could not be forfeited.

Similar in import, and by inverse reasoning identical, is the case of *Lees* v. *United States*, 150 U.S. 476. In that forfeiture action seeking to impose a penalty for bringing aliens into the United States contrary to law, the defendant was called on as a witness by the Government. This Court held that in such a case a defendant could not be compelled to be a witness against himself, and the case was sent back for retrial without his testimony. Here the forfeiture is sought because the defendant elected not to be a witness against himself.

This case can only be equated with *Garrity* v. *State of New Jersey*, 385 U.S. 493, where the police officers were given the choice of incriminating themselves or forfeiting their jobs. Here the choice was incriminate yourself or forfeit your money. That this respondent elected not to incriminate himself does not carry with it the correlative that his money is forfeit. This Court has emphasized that the choice to speak in the unfettered exercise of one's own free will and to suffer no "penalty" for silence, as enunciated by it in *Malloy* v. *Hogan*, 378 U.S. 1, does not restrict "penalty" to fine or imprisonment. *Spevack* v. *Klein*, 385 U.S. 511, 515.

B.

UNITED STATES v. ONE 1965 BUICK, 392 F. 2d 672, ERRS IN ITS CONCLUSION THAT THE PRIVILEGE AGAINST SELF-INCRIMINATION IS A MERE "EXCLUSIONARY" RULE OF EVIDENCE. THE INTERRELATION WOULD COMPEL SELF-INCRIMINATION IN EITHER CASE.

Certiorari was granted in this cause because of a seeming conflict between this case and *United States* v. *One 1965*

Buick, 6 Cir., 392 F. 2d 672. The essence of that decision is found at page 676 where the Court said:

> "The mere fact that an exclusionary rule of evidence may prevent a conviction for the criminal offense of violating the Internal Revenue laws, does not expunge civil liability for payment of the tax." *United States* v. *One 1965 Buick,* 6 Cir., 392 F. 2d 672, 676.

We respectfully disagree that the exercise of the privilege against self-incrimination constitutes a mere "exclusionary rule of evidence". Illustratively, if an agent testified that he questioned a defendant, and the defendant refused to answer, that is evidence that is excluded under the exclusionary rule. See *Tehan* v. *United States,* 382 U.S. 406. Here we have a case where only proof of a person adhering to his Fifth Amendment privilege constitutes proof of the crime that makes the respondent moneys subject to forfeiture. That is an attack on a fundamental right safeguarded by the Fifth Amendment. See *Gideon* v. *Wainwright,* 372 U.S. 335.

The Sixth Circuit continues its reasoning in arriving at the conflicting decision:

> There can be no question but that Congress has power to tax unlafwul activities. The fact that a business is unlawful does not exempt it from payment of taxes. United States v. Sullivan, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed. 1037 (1927).

That Court's reliance upon this Court's decision in *United States* v. *Sullivan,* 274 U.S. 259 is inapposite. In an income tax return required by virtually every citizen to file, a person invoking his privilege against self-incrimination as to his occupation allows an effective exercise of that constitutional right. Whereas here, filing of the return exclusive to a certain class points unerringly and directly to a specific type of occupation even if the privilege were invoked as to every question.

The decision in that case seems to overlook the recognition in *Marchetti* and *Grosso* that

> "The statutory obligations to register and to pay the occupational tax are essentially inseparable elements of a single registration procedure; Form 11-C thus constitutes both the application for registration and the return for the occupational tax." *Marchetti* v. *United States,* 390 U.S. 39, 42-43.

Since the interrelation of the payment and the registration are clearly recognized, and the taxes cannot be paid without the concomitant abandonment of Fifth Amendment rights, there can be no "willful failure" to pay taxes or make a return so as to make the articles and things forfeit under Title 26 U.S.C. 7203.[2]

Further, the Sixth Circuit, in rejecting the Seventh Circuit decision in this case, concluded with a kind of catch-all that

> "In any event, the property forfeited was found to be contraband and appellants are not entitled to have it returned to them." 39 F.2d at 784.

This overlooks the distinction this Court made in *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693, between "derivative contraband" and "per se contraband". Obviously the respondent here is within the former classification. Equally obviously it must derive criminality from a criminal act.

We think the Sixth Circuit's and the Government's insistence that the distinction from *Marchetti* and *Grosso* exist in criminal prosecutions versus civil cases overlook the Constitutional claim here bottomed on the Fifth Amendment.

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[2] We experience some practical difficulty in perceiving how three Buicks and three adding machines were intended for use in failing to file a return or pay taxes. 392 F.2d at 697 and Title 26 U.S.C. 7302.

In trying to impress this Court that different standards apply, the Government lists the differences at page 15 of its brief, such as the power of the court to direct the verdict in favor of the Government, the lesser burden of proof, the want of right of confrontation, the availability of appeal to the Government, etc., would have seemed to have been effectively answered many years ago by this Court in *United States* v. *Regan,* 232 U.S. 494. In that case, holding that proof beyond reasonable doubt, was not necessary in forfeiture proceedings differentiated the Government's claimed distinctions from the posture of this case when it said:

> "The cases of Boyd v. United States, 116 U.S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524, and Lees v. United States, 150 U.S. 476, 37 L. ed 1150, 14 Sup. Ct. Rep. 163, are without present application for they deal with the guaranty in the 5th Amendment to the Constitution against compulsory self-incrimination, which, as this court has held, embraces proceedings to enforce penalties and forfeitures as well as criminal prosecutions, and is of broader scope than are the guaranties in article 3 and the 6th Amendment governing trials in criminal prosecutions." *United States* v. *Regan,* 232 U.S. 494, 499.

The Government's profferred distinctions emphasizing the absence of 6th Amendment rights, and the double jeopardy right of the 5th Amendment, have been over and over again distinguished from the pervasiveness of the 5th Amendment privilege against self-incrimination. In *Counselman* v. *Hitchcock,* 142 U.S. 547, this Court emphasized that the 6th Amendment was much narrower in scope and concept than the 5th. (142 U.S. at 563)

In approving the use of depositions in a forfeiture proceeding, this Court in *United States* v. *Zucker,* 161 U.S. 475, again emphasized no provisions under the 4th and the incrimination provision of the 5th Amendment were affected.

Again in *Hebner* v. *United States,* 213 U.S. 103, this Court reiterated that the pervasive rights under the Fourth and incriminating provisions of the Fifth are unaffected by the fact that, in a penalty or forfeiture proceeding, there can be a direction of the verdict in favor of the government.

As this Court said in *Hitchcock,*

> "It is quite clear that legislation cannot abridge a constitutional privilege. . . ." (142 U.S. at 585)

C.

THE INSTANT CASE IS PARTICULARLY APPROPRIATE TO RETROSPECTIVE APPLICATION

The purpose to be served by the "new" standards is a reiteration of the basic concept of American jurisprudence that none shall be penalized for exercise of a Constitutional right. This Court had no hesitancy in granting retroactive application in a recent civil case where first Amendment rights were involved. *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130.

The extent of reliance by law enforcement officials and the effect on the administration of justice would seem to apply only when the "old" standard is firmly entrenched.

Due regard for contravailing considerations — reliance on the old standard of *Kahriger* and *Lewis* and the impact of retroactivity upon the administration of justice does not counsel against retroactivity of *Marchetti* and *Grosso.* Borrowing from this Court's language in *Roberts* v. *Russell,* 392 U.S. 293, the element of reliance is not persuasive, for *Kahriger* and *Lewis* have been under attack from their inception, and many courts, while feeling bound by this Court's decision in those cases, consistently urged reconsideration.

Further, it seems that this Court has already directed the application of *Marchetti* and *Grosso* to this case when it vacated the judgment of the Court of Appeals and remanded it to that Court for further consideration in the light of its decision, which procedure seems the proper one where retroactivity or limited retroactivity are to be employed. See *Desist* v. *United States*, 394 U.S. 244, 259, Justice Harland dissenting.

Additional authorities following the decision of the Seventh Circuit, some expressly rejecting the Sixth, are *United States* v. *One Philco Television*, S.D.Tex., 292 F. Supp. 35; *Silbert* v. *United States*, D.Md. 289 F. Supp. 318; *United States* v. *$3,296.00 in Currency*, N.D. N.Y., 286 F. Supp. 543; *United States* v. *$125,882.00 in Currency*, S.D.N.Y., 286 F. Supp. 643; and *United States* v. *One 1967 Buick Electra*, 225, D.N.J., 289 F. Supp. 642.

Other authorities relied on by United States

We request the Court to observe some cases mentioned by the Government:

1. *Kimm* v. *Rosenberg*, 363 U.S. 405, was "a five to four decision the other way and accurately reflected the pre-*Malloy* v. *Hogan* construction of the Fifth Amendment." *Spevack* v. *Klein*, 385 U.S. 511, 514, footnote 2.

2. *Kaufman* v. *Hurwitz*, 4 Cir., 176 F. 2d 210 is a case involving a refusal to answer by a person seeking a discharge in bankruptcy, questions asked at the first meeting of creditors. Of course, that aspect of bankruptcy has fulfilled the coextensive immunity that this Court invited the Congress to make in respect of the wagering statute. See Title 11, U.S.C., §25(a)(10) providing that "no testimony given by him shall be offered in evidence against him in any criminal proceeding, . . . "

3. The many citations regarding innocent owners is not available here. In *Boyd*, the Supreme Court shrugged off such a contention in circumstances such as this.

> "In *U. S.* v. *Mason*, Judge Blodgett took the distinction that in proceedings *in rem* for a forfeiture, the parties are not required by a proceeding under the Act of 1874 to testify or furnish evidence against themselves, because the suit is not against them but against the property. But where the owner of the property has been admitted as a claimant, we cannot see the force of this distinction; nor can we assent to the proposition that the proceeding is not, in effect, a proceeding against the owner of the property, as well as against the goods; for it is his breach of the laws which has to be proved to establish the forfeiture, and it is his property which is sought to be forfeited; and to require such an owner to produce his private books and papers, in order to prove his breach of the laws, and thus to establish the forfeiture of his property is surely compelling him to furnish evidence against himself. In the words of a great judge: 'Goods, as goods, cannot offend, forfeit, unlade, pay duties or the like, but men whose goods they are.' "
>
> *Boyd* v. *United States*, 116 U.S. 616, 637.

4. The Government is in error when it says that this Court applied *Cipriano* v. *City of Houma*, 395 U.S. 701, in a "wholly prospective fashion." On the contrary, limited retroactivity was applied in that case.

> "Therefore, we will apply our decision in this case prospectively. That is, we will apply it only where, under state law, the time for challenging the election result has not expired, or in cases brought within the time specified by state law for challeneging the election and which are not yet final." *Cipriano* v. *City of Houma*, 395 U.S. 701, 706.

Respondent respectfully reminds this Court that Donald J. Angelini, the owner of the coin and currency involved herein, is not an "accidental beneficiary" of *Marchetti* and

Grosso. Mr. Angelini raised the invalidity of Sections 4411 and 4412 of Title 26, U.S.C., as far back as 1965 in cause entitled *United States of America* v. *Donald J. Angelini,* 7 Cir., 346 F. 2d 278, where he was convicted of a failure to file said returns, served his sentence, and paid his fine. He urged the invalidity of these sections in the United States Court of Appeals for the Seventh Circuit and in this Court under cause entitled *Angelini* v. *United States,* 382 U.S. 832. This Court denied certiorari. Thus Donald J. Angelini has protested prior violation of his Fifth Amendment rights consistently and continues so to do before this Court in this action.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully submitted that the judgment of the Court below be affirmed.

Respectfully submitted,

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